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May 25, 2005

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BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

214069

Re: STB Docket No. Ex Parte No. 230, Sub-No. 9
Improvement of TOFC/COFC Regulation,
WTL Rail Corporation,
Petition for Partial Revocation of Exemption

STB Docket No. 42092, - 214070
WTL Rail Corporation,
Petition for Declaratory Relief

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are the original and ten (10) copies of BNSF Railway Company's Reply to Petition for Partial Revocation of Exemption and Petition for Declaratory and Interim Relief. The text of the pleading is contained in the enclosed disk.

I would appreciate it if you would date-stamp the enclosed extra copy and return it to the messenger for our files. Please let me know if you have any questions. Thank you for your assistance.

Sincerely yours,

Robert M. Jenkins III/cls

Robert M. Jenkins III

Enclosures

cc: John D. Heffner, Esq.

BEFORE THE

SURFACE TRANSPORTATION BOARD

Ex Parte No. 230, Sub-No. 9 -214069

IMPROVEMENT OF TOFC/COFC REGULATION

BNSF REPLY TO WTL RAIL CORPORATION
PETITION FOR PARTIAL REVOCATION OF EXEMPTION

STB Docket No. 42092 -214070

BNSF REPLY TO WTL RAIL CORPORATION
PETITION FOR DECLARATORY AND INTERIM RELIEF

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Dated: May 25, 2005

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Ex Parte No. 230, Sub-No. 9

IMPROVEMENT OF TOFC/COFC REGULATION

BNSF REPLY TO WTL RAIL CORPORATION
PETITION FOR PARTIAL REVOCATION OF EXEMPTION

STB Docket No. 42092

BNSF REPLY TO WTL RAIL CORPORATION
PETITION FOR DECLARATORY AND INTERIM RELIEF

BNSF Railway Company ("BNSF") hereby files this Reply to the Petition for Partial Revocation of Exemption ("Revocation Petition") and Petition for Declaratory and Interim Relief ("Declaratory Request") filed by WTL Rail Corporation ("WTL") in these proceedings.[1] In its Revocation Petition, WTL requests that the Board partially revoke the trailer-on-flat-car

[1] In its Declaratory Request, WTL seeks an order initiating a proceeding as well as a declaratory ruling that BNSF and the other named railroads have violated certain cited provisions of Title 49 of the U.S. Code. WTL also seeks interim relief in the form of a "housekeeping" stay. BNSF's Reply primarily addresses the Revocation Petition and establishes that WTL has not met the required burden for partial revocation of the TOFC/COFC Exemption. BNSF responded to WTL's request for a "housekeeping" stay in its May 13, 2005 letter to the Board, and it reserves the right to respond to WTL's car service and unreasonable practices allegations should the Board initiate a proceeding.

("TOFC")/container-on-flat-car ("COFC") exemption originally granted in Ex Parte No. 230 (Sub-No. 5), Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981), aff'd in relevant part sub nom. American Trucking Ass'ns, Inc. v. I.C.C., 656 F.2d 1115 (5th Cir. 1981) ("TOFC/COFC Exemption"). WTL seeks that partial revocation in order to challenge through its Declaratory Request the recent notices given independently by BNSF and four other Class I railroads[2] to terminate their contractual "Trailer Use Agreements" with WTL. Pursuant to those agreements, WTL has rented its fleet of 950 owned or leased TOFC trailers to the railroads for their use in providing unregulated intermodal service.[3] WTL asserts that BNSF's (and the other railroads') termination of the Trailer Use Agreements constitutes a violation of the car service provisions of 49 U.S.C. 11121(a) as well as an unreasonable practice under 49 U.S.C. 10702(2) and 10704(a)(i).

In order to secure partial revocation of the TOFC/COFC Exemption, WTL must show, first, that it has standing and, second, that re-regulation of BNSF's and other railroads' TOFC equipment service practices is "necessary to carry out the transportation policy of section 10101 of this title." 49 U.S.C. 10502(d). This means showing that revocation of the exemption is necessary to remedy an abuse of market power. See Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G. & T. Terminal Packaging Co., Inc., et al. to Revoke Conrail Exemption, 8 I.C.C.2d 674, 685 (1992) ("Rail General Exemption Authority"). WTL has demonstrated neither that it has standing nor that BNSF and the other

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[2] Norfolk Southern Corporation ("Norfolk Southern"), Union Pacific Railroad Company ("Union Pacific"), Canadian Pacific Railway, and Kansas City Southern Railway.

[3] By letter dated May 6, 2005, WTL submitted corrected pages to its two petitions reducing the number of trailers reported in the WTL fleet from 1500 to 950.

railroads providing TOFC service even have market power – much less that they have abused it. Moreover, WTL acknowledges that in the case most directly on point, Docket No. 40774, American Rail Heritage, Ltd. D/B/A Crab Orchard & Egyptian Railroad, et al. v. CSX Transportation, Inc. (served June 16, 1995), 1995 WL 358842 ("American Rail Heritage"), the ICC ruled 3-1 against WTL's position here. See Revocation Petition at 10. It is difficult to conceive of a less meritorious case than WTL's for revocation of the long-established and highly successful TOFC/COFC Exemption.[4]

BACKGROUND

A. History of the TOFC/COFC Exemption

The TOFC/COFC Exemption was the direct result of Congress' mandate in the Staggers Rail Act of 1980 that the ICC should "minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. 10101(2). The exemption provisions in the statute that had previously been permissive were strengthened and made mandatory. The ICC was now ***required*** to exempt a rail service from regulation where it was "not necessary to carry out the transportation policy of section 10101" and "not needed to protect shippers from the abuse of market power." 49 U.S.C. 10502(a)(1) and (2). Revocation of an exemption was justified only if it was later proven necessary to correct "abuses of market power." H.R. Conf. Rep. No. 96-1430, at 104 (1980), reprinted in 1980 U.S.C.C.A.N. 4110, 4136.

From the outset, TOFC and COFC rail services were seen as prime candidates for complete deregulation. Indeed, the statute itself singled out intermodal transportation as

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[4] Attached in support of BNSF's Reply is the Verified Statement of Edward Zajac, who is BNSF's Assistant Vice President – Intermodal/Auto Equipment. The statement is referenced herein as "V.S. Zajac."

particularly appropriate for exercise of the ICC's exemption authority. See 49 U.S.C. 10502(f). The reason was abundantly clear. TOFC/COFC service is "highly competitive." Improvement of TOFC/COFC Regulation, 364 I.C.C. at 734. Not only is there "vigorous competition" between TOFC/COFC and motor carrier service (ibid.), but rail carriers also compete strongly with each other for this business (see id. at 735). The ICC found ample support for its view that "regulatory constraints had impeded the development of intermodal service, and that exemption from regulation would likely stimulate improvements in service without threatening any harm to individual shippers." Id. at 732. The ICC was ***not*** impressed by arguments that the business of less efficient participants in the transportation chain could suffer in a deregulated market environment. It ***expected*** railroads to enhance their own services by doing business with companies that themselves offered "the most competitive and efficient services." Id. at 735.

The result of complete deregulation of rail TOFC/COFC services was exactly what the ICC predicted. TOFC/COFC service improved substantially, and the business expanded exponentially. In 1987, the ICC had the opportunity to assess the success of the TOFC/COFC Exemption in the context of requests that the exemption be expanded to cover the over-the-road portion of TOFC/COFC service in trucks that were not rail-owned or controlled. Ex Parte No. 230 (Sub-No. 6), Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers), 3 I.C.C.2d 869 (1987). The ICC found that piggyback traffic had grown particularly rapidly and that none of the predictions of abuse, made mostly by transportation companies that could lose business in a deregulated environment, had come true. See id. at 879. Stressing that "the overriding regulatory objective of the Staggers Act was to replace regulation with market discipline whenever competitive forces are sufficient to ensure

reasonable rates and service" (id. at 880),[5] the ICC extended the TOFC/COFC Exemption to services performed by both railroad-affiliated motor carriers and by motor carriers operating as agents or joint-rate partners of railroads (See id. at 884).

Two years later, in Ex Parte No. 230 (Sub-No. 7), Improvement of TOFC/COFC Regulations (Pickup and Delivery), 6 I.C.C.2d 208 (1989), the ICC expanded the TOFC/COFC Exemption once again, to include all motor carrier TOFC/COFC pickup and delivery operations. The ICC noted that "the strong support of the shippers for a broadened exemption confirms the success of the intermodal exemption program thus far" and found that expanding the exemption would have "clear benefits for the shipping public: more efficient coordinated service, more flexibility with respect to rates and services; better and more equal opportunities for shippers' associations to compete with parties able to take advantage of exempt joint rate or agency arrangements; more competition among truckers for ex-rail traffic; and greater freedom from unnecessary and unproductive economic regulatory constraints." Id. at 215-16.

It was against this backdrop that the ICC in 1995 considered the claims of two Class III railroads and a non-carrier logistics company in American Rail Heritage that the ICC should partially revoke the TOFC/COFC Exemption to require CSX Transportation, Inc. ("CSXT") to

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[5] The ICC found again that the intermodal market was highly competitive: "By its very nature, piggyback in general competes with over-the-road truck service. The intermodal equipment used is specifically designed for rail, truck, or both. There is already vigorous competition for piggyback movements in coordinated rail-truck service (using either rail-owned, rail affiliated, or other trucks), and in all-highway service. TOFC/COFC 'rates are strictly controlled by truck [and presumably also rail-truck] competition.' *Boxcars,* 367 I.C.C. at 433. Moreover, commodities that can move in trailers and containers can also move in conventional truck service and now-exempt boxcar service. *Boxcars,* 367 I.C.C. at 433." Id. at 881.

continue to take and pay for truck trailers tendered in interchange by the two Class III railroads.[6] The ICC noted that in adopting the TOFC/COFC Exemption it had determined that regulation of trailer interchange was unnecessary, and the ICC stressed that "[t]he burden is on the complainants to demonstrate that regulation of interchange is required and that the basis of the TOFC/COFC Exemption – that competition in the area of TOFC/COFC may be relied upon to realize the goals of the rail transportation policy – is incorrect, at least as applied to the complainants." Id. at *3. The ICC was not persuaded that the business impact on the complainants or other Class III railroad equipment providers demonstrated that the national transportation system had been so "disrupted or compromised" by the lack of mandatory interchange that regulation of such interchange was required.[7] Id. at *4. "The exemption has been in effect since 1981, and the national transportation system, insofar as it involves intermodal transportation, has not only survived but flourished." Ibid. Accordingly, the ICC

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[6] CSXT had cancelled "trailer interchange agreements" it had with the two carriers, as well as four other Class III carriers. Those agreements set compensation for trailer use and allocated responsibility for maintenance and repair of the trailers. "After the agreements were cancelled, CSXT continued to accept complainants' trailers, but without paying compensation." American Rail Heritage, 1995 WL 358842, at *1.

[7] The ICC was particularly not persuaded that any competitive disadvantage that the trailers offered by the complainants might suffer in the marketplace because they were heavier and used old or recapped tires constituted grounds for partial revocation of the TOFC/COFC Exemption in order to require mandatory interchange of trailers. See ibid. "It may be that the admittedly older fleet[s] of [the complainants] have this problem, but there is no support offered for the assertion that this is true of intermodal trailers generally, or that, even if true, mandatory interchange of trailers is necessary. . . . [T]railer owners or lessees are not captive to the railroads when they seek to market their equipment; they may lease or sell their trailers to motor carriers [as private equipment]; and they may hook up their equipment behind tractors pursuant to any of the myriad [deregulated] arrangements by which equipment and the cargo they contain move over the highways. Complainants may choose not to put their equipment into the market for motor carrier service operating over the highways, but they have not shown that TOFC/COFC Exemption should be revoked." Id. at *3-4.

found that the "complainants have failed to make the initial showing required to invoke our authority in this case, and their request for revocation will therefore be denied." Ibid.

The ICC's decision to continue to allow the marketplace to govern the use and interchange of TOFC trailers was completely in keeping with its earlier decisions to encourage the efficient growth of intermodal business by removing the regulatory shackles that had previously constrained that business. In the 15-year period between passage of the Staggers Rail Act of 1980 and the ICC's American Rail Heritage decision, the number of trailers and containers carried annually by the railroads had grown from a little over 3 million to almost 8 million.[8] In the last ten years, the annualized number has grown to over 11 million.[9]

B. BNSF's Decision to Focus on Rail Service

The tremendous growth of intermodal service nationwide has been a direct outgrowth of the competitive efficiencies made possible by deregulation, and it has placed substantial demands on the railroads and their intermodal partners to continuously improve their operations in order to handle the burgeoning business. See V.S. Zajac at 2. As part of its own effort to improve its services, BNSF in late 2004 and early 2005 re-examined whether it should continue to manage the fleet of rail-controlled trailers it possessed. This re-examination was prompted by the change in the intermodal market which had occurred over the past five years. In particular, more and more door-to-door intermodal providers are using privately-owned equipment, rather than rail-owned or rail-leased equipment. Private equipment owners and lessees closely monitor their equipment to obtain higher equipment utilization, better turn time in intermodal facilities,

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[8] Association of American Railroads, Railroad Facts at 26 (2003 Ed.).

[9] Association of American Railroads, May 12, 2005 Press Release, "Rail Freight Traffic Continues to Gain," *available at* www.aar.org.

and, in the end, provide better intermodal service to the shipper. About 90% of BNSF's existing intermodal business already uses private equipment. See id. at 2-3.

Private equipment is already made available to shippers in the market place. Small shippers in particular access this equipment through many "third party logistics providers" such as Hub Group, Pacer Global Logistics, and Alliance Shippers. In fact, of the over 70,000 shipments that Alliance Shippers moved on BNSF in 2004, nearly 41% were in private equipment owned or supplied by Alliance Shippers. See id. at 3.

Given this change in the market, BNSF determined that it could better serve its customers by focusing on what it does best – rail services – rather than rail fleet management. With intermodal providers bringing more private equipment into the marketplace and with the high demand for intermodal service, BNSF could refocus its efforts on providing line-haul services and on keeping its network fluid in order to handle the increasing intermodal volume coming to its network. In addition, BNSF could allocate its capital to its infrastructure rather than to providing rail trailers, so that it could increase capacity for shippers on its network. See id. at 3.

BNSF undertook this re-examination of its use of rail-controlled trailers independently of other railroads.[10] BNSF determined that it would phase in the transition from rail-controlled trailers over a period of time to allow shippers to acquire their own equipment or work with trailer leasing companies to provide the equipment. Approximately half of the rail-controlled trailer fleet that BNSF participates in is scheduled to be transitioned back to the trailers' owners by September 1, 2005. The balance is expected to be returned to their owners between January

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[10] As noted by WTL in its Revocation Petition, BNSF was not the first railroad to seek to cancel a Trailer Use Agreement with WTL. See Revocation Petition at 2 (describing WTL's actions against CSXT in Ex Parte No. 230 (Sub-No. 8) and Docket No. 42090).

and June of 2006. BNSF determined not to return any trailers from September through December to avoid disrupting the peak fall and early winter traffic seasons. See V.S. Zajac at 3.

BNSF announced its decision to phase out rail-controlled trailers on April 18, 2005. Many shippers have already begun to make the transition to private equipment. It is important to note that BNSF's policy does not mean that the trailers will be removed from the marketplace or that BNSF will not handle trailers owned by WTL or any other trailer owner. It simply means that shippers will now have to work directly with trailer owners and that BNSF will treat those trailers for billing purposes the same as private trailers owned by non-railroad fleet operators. BNSF's notice expressly states that WTL's trailers and those of other equipment leasing companies "will be able to move on BNSF" with proper revenue billing. Thus, the only consequence to WTL once BNSF's notice goes into effect is that WTL's trailers will be handled by BNSF as private equipment. See id. at 3-4.

BNSF currently provides rates for private equipment. These private rates are generally lower than comparable rail-controlled trailer rates in order to reflect that the costs of ownership, maintenance and utilization are borne by the trailer owner rather than BNSF. BNSF's policy will not result in increases in these rates for private equipment. In fact, since BNSF will no longer bear financial responsibility for the empty movements of the rail-controlled trailers and will no longer incur storage and other overhead costs associated with such trailers, BNSF's overall costs will decrease. This will enable shippers who have been utilizing rail-controlled trailers to benefit from a lower overall BNSF cost structure, whether in the form of reduced rates, improved service or enhanced infrastructure and capacity. See id. at 4.

C. WTL's Petitions

WTL owns a small fleet of 950 trailers that it has been providing as rail-controlled trailers to BNSF and other railroads under Trailer Use Agreements. WTL acknowledges BNSF

had the right to terminate their Trailer Use Agreement.[11] At the same time, however, WTL suggests that the termination of that agreement "cries out for STB regulation to stop past and prevent future abuses." Revocation Petition at 8. Apparently, WTL wants the STB to step in and dictate regulatory Trailer Use Agreements, ostensibly for the benefit of shippers who otherwise will be forced to find "more expensive but unsatisfactory alternatives."[12] Id. at 9. WTL asserts that a partial revocation of the TOFC/COFC Exemption is justified so that the STB can conduct a declaratory order proceeding to determine whether BNSF and the other railroads have violated a car service obligation under 49 U.S.C. 11121(a) or committed an unreasonable practice under 49 U.S.C. 10702(2) and 10704(a)(i).

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[11] WTL attaches to its pleadings the Verified Statement of John J. Robinson, a former Association of American Railroads ("AAR") employee, who suggests that BNSF and the other railroads are using the wrong method of transitioning out of managing rail-controlled trailers. He complains that BNSF's and other railroads' cancellations of their contracts with WTL are in violation of AAR's Code of Trailer Service Rules. See V.S. Robinson at 3. He says that "a valid and more appropriate method to achieve such an objective would be to gradually discontinue offering Plan 2 rate quotations for specific traffic lanes." Id. at 4. The obvious problem with Mr. Robinson's position regarding "violation" of the AAR's Code of Trailer Service Rules is that it ignores that intermodal transportation is deregulated. Even WTL concedes that BNSF and the other railroads had no contractual obligation indefinitely to treat WTL's trailers as rail-controlled just because WTL wants them to. The AAR's rules for rail-controlled cars no more required BNSF to continue to treat WTL's cars as "rail-controlled" once their Trailer Use Agreement was terminated than the AAR's interchange rules required CSXT to continue indefinitely to take the cars of the complainants in American Rail Heritage. Mr. Robinson's suggestion that BNSF instead "gradually discontinue service" only underscores the kind of regulatory gamesmanship that would result from revoking the TOFC/COFC Exemption.

[12] To support the supposed need of shippers for WTL's trailers as rail-controlled equipment, WTL attaches to its petitions the Verified Statement of Richard M. Lombardo, the President of WTL Rail Corporation. Mr. Lombardo, however, does not demonstrate that there is any inherent need for railroads to offer rail-controlled trailers in the hotly competitive intermodal market. In fact, like Mr. Robinson, he suggests that, if BNSF wants to transition out of providing such equipment, it should gradually discontinue its Plan 2 quotations and quietly transition "under the radar." V.S. Lombardo at 10.

ARGUMENT

A. WTL Lacks Standing to Seek Partial Revocation

WTL ostensibly is seeking partial revocation of the TOFC/COFC Exemption in order to charge BNSF with violation of car service obligations and an "unreasonable practice." But WTL has no standing to claim that BNSF has violated any car service obligation or committed an unreasonable practice with respect to its provision of intermodal service to shippers. WTL is an equipment supplier. It is neither a shipper of goods in intermodal service nor a carrier of such goods. BNSF has neither a common carrier obligation to WTL nor an interchange obligation.[13] The only legal obligation BNSF had to WTL was the contractual obligation to abide by the terms of BNSF's Trailer Use Agreement with WTL while that agreement was in force, and to comply with the requirement under the agreement for 30 days' notice for either party to terminate the agreement.

WTL makes no claim that BNSF violated any of its contractual obligations to WTL. Instead, WTL claims in this proceeding that BNSF's termination of its agreement with WTL "undermines the railroads' obligation to furnish ***shippers*** with safe and adequate car service as required by 49 U.S.C. 11121(a)(1)." Revocation Petition at 3 (emphasis added). WTL even more broadly asserts that "[t]his case illustrates not only the continuing erosion of the ***common***

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[13] In this respect, this case differs from American Rail Heritage, where two of the complainants were Class III railroads, and the ICC highlighted the issue of whether partial revocation of the TOFC/COFC Exemption might ever be justified to regulate the interchange of intermodal equipment between Class I and Class III carriers. See 1995 WL 358842, at *4. WTL makes no claim that it is a Class III carrier, or any other kind of carrier. Indeed, WTL is identified as a "Non-Railroad Company" in "The Official Intermodal Equipment Register" submitted as an attachment to Mr. Lombardo's Verified Statement. Further, WTL makes no claim that BNSF or any other railroad owes WTL an interchange obligation, whether mandatory or otherwise.

carrier obligation of the railroads but the need for the Board to reassert its regulatory jurisdiction where market forces are insufficient to protect ***customers*** against the abusive practices of large railroad oligopolies." Ibid. (emphasis added). But no shipper or other railroad customer to which BNSF even arguably owes a common carrier obligation is a complainant in this proceeding. Even if TOFC/COFC service were regulated, WTL could not claim that BNSF must meet its car service or common carrier obligation to shippers by leasing trailer equipment from WTL.

The principles governing the standing requirements in proceedings before the STB are analogous to those in the federal courts. See, e.g., Docket No. 40343, Puerto Rico Manufacturers Ass'n, et al. v. Trailer Marine Transp. Corp., et al. (served July 24, 1990), 1990 WL 300490 at *4 (discussing standing requirements and finding that shipper association, as representative of members directly affected by the challenged rates, had standing to challenge reasonableness of rates but not to claim reparations). It is not enough that the complainant assert that it has suffered some injury as a result of the challenged conduct; it must demonstrate that it is within the zone of interests intended to be protected by statute it claims has been violated. See, e.g., Simmons v. ICC, 909 F.2d 186, 189-91 (7th Cir. 1990), cert. denied, 499 U.S. 919 (1981) (dismissing challenge to ICC abandonment decision on ground that the interest of rail employees in retaining their jobs is not within the zone of interests protected by the statute); American Barge Line Co., et al. v. Alabama Great S. R.R. Co., et al., 296 I.C.C. 247, 266 (1955) (reviewing cases holding that competing carrier has no standing in its own right to bring case for discrimination by a connecting carrier).

In this case, WTL acknowledges that, even if TOFC/COFC service were regulated, the obligation that BNSF would owe under Section 11121(a)(1) "to furnish shippers with safe and

adequate car supply" is to ***shippers***, not to equipment suppliers. Revocation Petition at 3. WTL is obviously not a shipper association and cannot claim to represent shippers in this proceeding.[14] Thus, it is not within the zone of interests protected by Section 11121. Nor can WTL claim that it has standing to assert an "unreasonable practice" in violation of BNSF's common carrier obligation. If TOFC/COFC service were regulated, as WTL also acknowledges, BNSF would owe a common carrier obligation to its ***customers***, not to any company that wished to supply equipment for BNSF to use in providing service. See ibid. WTL's contractual relationship with BNSF gave it only contractual rights, which BNSF completely fulfilled. WTL has no standing either to assert claims on behalf of shippers or to attempt to invoke statutory provisions designed to protect the interests of shippers.

B. WTL Has Failed to Show Why the STB Should Overturn Controlling Precedent

Even if WTL had standing, it has failed to demonstrate why the Board should overturn the precedent that applies directly to this case. The 1995 decision of the ICC in American Rail

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[14] Attached to Mr. Lombardo's statement are letters from two logistics companies, San Andreas Fast Forwarding, Inc., and Alliance Shippers, Inc., complaining of possible inconvenience for their businesses and for their shipper customers in the same vein as WTL. Aside from the facts that neither has chosen to appear as a party in this proceeding and neither purports to represent shippers, neither demonstrates why they or their customers cannot conduct their businesses using private trailers.

Counsel for WTL attached to a letter he filed on May 5, 2005, a copy of a one-page letter from the National Onion Association, which appears to be a shipper association, but which also has not chosen to become a party in this proceeding. That letter grossly mischaracterizes the actions of BNSF and the other railroads – "to curtail and even cancel conveyance via van trailers." In any event, even if the National Onion Association had chosen to appear as a party, no one is here claiming that the STB should not only revoke TOFC/COFC Exemption, but also revoke the fresh fruits and vegetables exemption that applies to the carriage of onions. See Rail General Exemption Authority–Fresh Fruits and Vegetables, 361 I.C.C. 211 (1979). Absent revoking ***both*** exemptions, the STB could not consider any regulatory claim of car service or "unreasonable practice" violations.

Heritage was carefully considered and informed by filings from a wide variety of parties.[15] Moreover, it built upon established law governing revocation proceedings. Earlier, in Rail General Exemption Authority, the ICC had concluded that "a party [seeking revocation of an exemption] has a burden of showing that [the agency's] prior findings supporting the initial exemption were ***clearly wrong***, or that changed circumstances require [the agency] to revisit them." 8 I.C.C.2d at 677 (emphasis added). Since traffic is typically exempted from regulation on the basis of the agency's conclusion that the marketplace is sufficiently competitive so as not to require continued regulation, "the first thing [the Board should] look at in assessing a petition to revoke an exemption is whether the carrier possesses substantial market power." Id. at 682. See also Mr. Sprout, Inc. v. U.S., 8 F.3d 118, 123 (2d Cir. 1993) ("the initial inquiry in a reregulation case is whether the carrier has market power").

The petitioner bears a heavy burden of demonstrating that the carrier possesses such market power, because it must overcome the agency's prior determination to the contrary. Here, WTL has not come close to meeting even that threshold standard for partial revocation.[16] It has

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[15] In addition to the complainants and CSXT, the parties filing comments and statements in the American Rail Heritage proceeding included the AAR, Union Pacific, Norfolk Southern, Burlington Northern Railroad Company, Consolidated Rail Corporation, the Mandatory Interchange of Equipment Group, Patrick W. Simmons on behalf of the United Transportation Union, Illinois Legislative Board, and the Iowa Interstate Railroad, Ltd.

[16] WTL's reliance on Docket No. 42083, Granite State Concrete Co., Inc. & Milford-Bennington Railroad Co., Inc. v. Boston and Maine Corp. & Springfield Terminal Railway Co., (STB served Sept. 15, 2003), for the proposition that it need not file a petition for partial revocation is misplaced. In that proceeding, the STB did partially revoke an exemption to determine if the underlying purposes of the exemption were being served, but it still required a finding that the statutory standard for revocation was met. See slip op. at 7. Also, contrary to WTL's claim, there was a request for revocation by a party – albeit during the proceeding. The Board did not initiate the revocation itself. Moreover, the decision does not support partial revocation because, unlike here, there was an evidentiary basis for concluding that the

(cont'd)

not presented even an arguable basis for concluding that BNSF and the other railroads have market power over TOFC transportation services, and that the ICC's express findings that TOFC transportation services are highly competitive and that no carrier possesses market power in the provision of TOFC/COFC services are "clearly wrong."[17]

The ICC in American Rail Heritage applied the established revocation law to a case involving the cancellation of trailer use agreements with Class III carriers trading in TOFC trailers, just as WTL trades in TOFC trailers. The ICC found that the complainants there had failed to demonstrate that the basis of the TOFC/COFC Exemption – that competition in the area of TOFC/COFC may be relied upon to realize the goals of the rail transportation policy – is incorrect. See 1995 WL 358842, at *3. Although WTL recognizes that this precedent is directly applicable to this case (see Revocation Petition at 10), it fails utterly to demonstrate that circumstances have so changed in the TOFC/COFC market since 1995 (or 1981) that railroads now have market power and marketplace competition cannot be relied upon to protect shippers against abusive rates or service.[18] In light of the governing precedent of Rail General Exemption Authority and American Rail Heritage, WTL's Revocation Petition should be rejected for failure

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(... cont'd)

competitive service options that were the basis for the original exemption were lacking. See ibid.

[17] To the limited extent WTL even addresses the market power issue, it includes wholly conclusory statements which lack evidentiary support. See, e.g., Revocation Petition at 8 ("Board regulation would advance the goal of 49 U.S.C. 10101(12) insofar as it would prohibit the Railroad's [sic] from using their market power to force 'rail-controlled' trailers such as that of WTL off the rails").

[18] The emphasis that WTL places on the "strong dissent" of Commissioner McDonald only underscores the weakness of WTL's position. Revocation Petition at 10. WTL was decided by a three-commissioner majority, and their decision is agency law, not the dissent of a single commissioner.

to carry its burden of demonstrating that the fundamental competitive predicate of the TOFC/COFC Exemption was or is "clearly wrong."

C. Regulation is Not Required to Preserve the Benefits of TOFC/COFC Competition

Even if WTL had made a serious effort to demonstrate that competition no longer prevailed in the market for TOFC transportation services, and that re-regulation was required to protect shippers from market abuse, its Revocation Petition would fail. In the first place, as described by Mr. Zajac, the TOFC market, like the entire intermodal market, is highly competitive, and TOFC trailers vigorously compete with motor carriers and COFC traffic. See V.S. Zajac at 1-2. According to the Intermodal Association of North America ("IANA"), 2004 was the best year ever for intermodal growth. (see www.intermodal.org/pr/pr-MktTrends4Q04.html). There were approximately 716,000 intermodal trailers in service in the United States in 2004, and fourth quarter 2004 trailer volume was its highest in five years, with 53-foot trailers once again setting the pace with a 23% gain, marking their 12th straight quarter of double-digit growth. See ibid. Yet, according to IANA, only just over 20% of intermodal volumes in 2004 moved in TOFC trailers. (see www.intermodal.org/fact.html).

Numerous firms offer services competitive with BNSF's TOFC transportation service. Shippers can truck their freight to any intermodal ramp offering the best service at the lowest rate, or the freight can move entirely by highway. The TOFC/COFC market was fiercely competitive when the ICC exempted the market in 1981; it was fiercely competitive when the ICC decided the American Rail Heritage case in 1995; and today it is more competitive than ever.

Second, even if the 30,000 trailers that WTL claims are at issue here are no longer managed by the railroads under Trailer Use Agreements, WTL has not demonstrated that the

suppliers of such trailers cannot shift their trailers to highway or highway/rail movements. WTL concedes that its trailers previously were used by trucking companies in "over-the-road service". V.S. Lombardo at 1 n.1. Moreover, a number of the major companies that own rail-controlled trailers already offer the exact same trailer types to shippers for sale or lease. For instance, according to its website (www.xtraintermodal.com/content/trailers.asp), XTRA Intermodal offers trailers to "intermodal companies that require trailers for the shipment of their freight moving 'TOFC' (piggyback) with all railroads throughout North America." XTRA Intermodal makes its trailers available at facilities and depots with good highway access and close proximity to intermodal hub centers. The trailers allow shippers "to enjoy optimum equipment utilization and transportation efficiency without associated ownership costs."

Similarly, General Electric's TIP Leasing/Rental offers a Trailer Fleet Services program which provides shippers which access to over 135,000 trailers and an extensive North American branch network. TIP's website (www.trailerservices.com) provides for online customer enrollment and registration, and TIP will even deliver the trailers to the shipper from one of its branch locations.

Thus, there is nothing that would preclude WTL from providing similar trailer leasing services to shippers. In fact, WTL's website (www.wtlrail.com) indicates that the company already offers to sell or lease certain of its 48' and 53' trailers to shippers.

Accordingly, it is clear that regulation of BNSF's and the other railroads' independent decisions to transition rail-controlled trailers back to their owners is not needed in order to assure that the competition envisioned by the TOFC/COFC Exemption will be maintained. As the Board noted in American Rail Heritage, TOFC/COFC competition has "flourished" (1995 WL 358842, at *4), and is, if anything, significantly stronger and more vibrant than it was in 1995.

While the transition of rail-controlled trailers back to their owners may cause those owners to need to refocus their marketing and sales efforts toward shippers rather than to the railroads, the demand for trailers will remain, and such short-term dislocations will not undercut TOFC/COFC competition. As was the situation when the TOFC/COFC Exemption was approved, WTL and other rail-controlled trailer owners as well as shippers can fully enjoy the benefits of intermodal competition. Shippers can continue to ship their traffic in the exact same trailers over the same routes that they use today on the railroad (at lower rates) by simply making arrangements to buy or lease trailers from their owners. They can also move their traffic in over-the-road trucks and in containers.[19] Similarly, WTL and other trailer owners can actively participate in intermodal competition by selling or leasing their trailer fleets directly to shippers.

In sum, WTL has failed to show that partial revocation is necessary in order to achieve the competition the TOFC/COFC Exemption envisioned. Its Revocation Petition should be denied.

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[19] WTL asserts that these alternatives are more expensive, slower or unsuited to shipper needs. See Letter from John D. Heffner to Secretary Vernon A. Williams, May 16, 2005, at 2. Even if true (which WTL has not shown to be the case), shippers can easily avoid these potential disadvantages by purchasing or leasing trailers to move their traffic via rail exactly as they do today.

CONCLUSION

For the reasons set forth below, BNSF respectfully requests that the Board deny WTL's Petition for Partial Revocation of Exemption and Petition for Declaratory and Interim Relief.

Respectfully submitted,

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Dated: May 25, 2005

VERIFIED STATEMENT OF
EDWARD ZAJAC

My name is Edward Zajac. I am Assistant Vice President Intermodal/Auto Equipment at BNSF Railway Company ("BNSF"). My business address is 2650 Lou Menk Drive, Fort Worth, Texas 76131.

I have held various positions in the rail industry since 1974. I have been involved with intermodal traffic since 1979, and specifically with intermodal equipment issues since 2001.

As Assistant Vice President Intermodal/Auto Equipment, I am responsible for the acquisition, supply, maintenance and distribution of BNSF's fleet of intermodal cars, trailers, containers and chassis, as well as BNSF's autorack fleet.

The purpose of my testimony is to provide information about the highly-competitive nature of the intermodal market and about BNSF'S decision to transition its fleet of rail-controlled trailers back to their owners so that BNSF can focus on the provision of line-haul service.

The Intermodal Market

The market for intermodal transportation is highly competitive, and no carrier can or does exercise market power in the market. The market is among the fastest growing in the rail industry and likely the most competitive. It is characterized by fast-paced innovation and strong customer preferences.

BNSF's intermodal business is faced with intense competition from motor carriers, steamship companies and other railroads on a daily basis. This intense competition has resulted in increased shipper demands for better equipment and better service.

As a result of this intermodal competition, shippers have numerous opportunities available to them to move their traffic. In addition to purchasing their own "private" equipment, they can choose between trailers-on-flat-cars ("TOFC"), containers-on-flat-cars ("COFC"), rail boxcars, motor carriers, and, where appropriate, barges. They can secure equipment for these moves from hundreds of motor carriers, third parties (freight forwarders and shipper agents), and leasing companies. Rail carriers have little or no ability to control the market, as virtually all intermodal traffic is subject to truck diversion if either the rates, service, or equipment is unacceptable to shippers.

As a result of the highly competitive nature of the intermodal market, there has been a tremendous increase in intermodal service nationwide. This increase is a direct output of that competition, and it has placed substantial demands on railroads and their intermodal partners to continuously improve their operations in order to handle the burgeoning business.

BNSF Rail-Controlled Trailer Transition Plan

As a part of its own effort to improve its services, BNSF in late 2004 and early 2005 re-examined whether it should continue to manage the fleet of rail-controlled trailers it possessed. This re-examination was prompted by the change in the intermodal market which had occurred over the past five years. In particular, more and more door-to-door intermodal providers are using privately-owned equipment, rather than rail-owned or rail-leased equipment. Private equipment owners and lessees closely monitor their equipment to obtain higher equipment utilization, better turn time in intermodal facilities, and, in the end, provide better intermodal service to the shipper. About 90% of BNSF's existing intermodal business already uses private equipment.

Private equipment is already made available to shippers in the market place. Small shippers in particular access this equipment through many "third party logistics providers" such

as Hub Group, Pacer Global Logistics, and Alliance Shippers. In fact, of the over 70,000 shipments that Alliance Shippers moved on BNSF in 2004, nearly 41% were in private equipment owned or supplied by Alliance Shippers.

Given this change in the market, BNSF determined that it could better serve its customers by focusing on what it does best – rail services – rather than rail fleet management. With intermodal providers bringing more private equipment into the marketplace and with the high demand for intermodal service, BNSF could refocus its efforts on providing line-haul services and on keeping its network fluid in order to handle the increasing intermodal volume coming to its network. In addition, BNSF could allocate its capital to its infrastructure rather than to providing rail trailers, so that it could increase capacity for shippers on its network.

BNSF undertook this re-examination of its use of rail-controlled trailers independently of other railroads. BNSF determined that it would phase in the transition from rail-controlled trailers over a period of time to allow shippers to acquire their own equipment or work with trailer leasing companies to provide the equipment. Approximately half of the rail-controlled trailer fleet that BNSF participates in is scheduled to be transitioned back to the trailers' owners by September 1, 2005. The balance is expected to be returned to their owners between January and June of 2006. BNSF determined not to return any trailers from September through December to avoid disrupting the peak fall and early winter traffic seasons.

BNSF announced its decision to phase out rail-controlled trailers on April 18, 2005. Many shippers have already begun to make the transition to private equipment. It is important to note that BNSF's policy does not mean that the trailers will be removed from the marketplace or that BNSF will not handle trailers owned by WTL or any other trailer owner. It simply means that shippers will now have to work directly with trailer owners and that BNSF will treat those

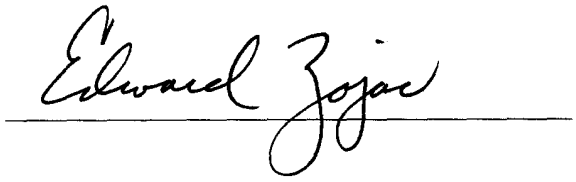
trailers for billing purposes the same as private trailers owned by non-railroad fleet operators. BNSF's notice expressly states that WTL's trailers and those of other equipment leasing companies "will be able to move on BNSF" with proper revenue billing. Thus, the only consequence to WTL once BNSF's notice goes into effect is that WTL's trailers will be handled by BNSF as private equipment.

BNSF currently provides rates for private equipment. These private rates are generally lower than comparable rail-controlled trailer rates in order to reflect that the costs of ownership, maintenance and utilization are borne by the trailer owner rather than BNSF. BNSF's policy will not result in increases in these rates for private equipment. In fact, since BNSF will no longer bear financial responsibility for the empty movements of the rail-controlled trailers and will no longer incur storage and other overhead costs associated with such trailers, BNSF's overall costs will decrease. This will enable shippers who have been utilizing rail-controlled trailers to benefit from a lower overall BNSF cost structure, whether in the form of reduced rates, improved service or enhanced infrastructure and capacity.

VERIFICATION

I, Edward Zajac, verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on May 23, 2005.



CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2005, a true and correct copy of the foregoing Reply to Petition for Partial Revocation of Exemption and Petition for Declaratory and Interim Relief was served by first-class mail, postage prepaid, or by a more expeditious manner, on the following persons:

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